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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Petition of the Association for Local)
Telecommunications Services (ALTS) for a)
Declaratory Ruling Establishing Conditions)
Necessary to Promote Deployment of)
Advanced Telecommunications Capability)
Under Section 706 of the Telecommunications)
Act of 1996)

CC Docket No. 98-78

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**JOINT COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. AND USN
COMMUNICATIONS, INC. IN SUPPORT OF THE ALTS PETITION FOR A
DECLARATORY RULING**

Hyperion Telecommunications, Inc. and USN Communications, Inc. ("Commenters"), pursuant to the Commission's ("FCC") Public Notice, DA 98-1019 (rel. May 28, 1998) issued in the above-captioned proceeding, respectfully submit the following comments in support of the Petition of the Association for Local Telecommunications Services ("ALTS Petition") for a declaratory ruling.

INTRODUCTION

Hyperion Telecommunications, Inc. ("Hyperion"), through affiliates and wholly owned subsidiaries, operates twenty-two competitive local exchange networks in twelve states (Arkansas, Florida, Kansas, Kentucky, Louisiana, Mississippi, New Jersey, New York, Pennsylvania, Tennessee, Vermont, and Virginia). These networks currently serve forty-six cities with approximately 5,363 miles of fiber optic cable.

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USN Communications, Inc. ("USN"), headquartered in Chicago, was founded in 1994 and provides service in more than 40 states. The company currently offers a bundled package of resold telecommunications products, and recently announced plans to build ADSL connections for high-speed Internet Access. As one of the fastest-growing competitive carriers in the United States, USN has sold over 250,000 local access lines.

Both Hyperion and USN support Petitioner's request for a declaratory ruling that Sections 251, 252 and 271 of the Act apply to data services. Full and forceful implementation of these Sections -- to enable CLECs to realize their full potential in deploying technology for advanced services and thereby stimulate BOCs to do the same -- is the best way to realize Section 706's mandate.

COMMENTS

ALTS' position is correct.¹ The Telecommunications Act of 1996 ("1996 Act") was carefully constructed to promote free and fair competition as the best way to provide choice of telecommunications services to all Americans. Given that BOCs maintain control of the public switched network (including the local loop, the vital and, for nearly all users, the exclusive, connection to communications services), the 1996 Act was designed, among other things, to curb BOCs' ability to limit physical access to the network and raise the price of loops above economic levels. After all, the potential for such anticompetitive conduct would otherwise position the BOCs to continue their control of an essential facility to obstruct competitive entry in local

¹ Hyperion has previously suggested the possibility of affirmative relief. *Opposition Comments of Focal Communications Corporation, Hyperion Telecommunications, Inc., KMC Telecom Inc., and McLeodUSA Incorporated*, CC Docket Nos. 98-11, 98-26, 98-32, dated April 6, 1998, at 10-11.

markets. This is particularly significant because, as the Commission is aware, the local loop has the potential to carry the next generation of high-bandwidth, packet-switched, voice and data services. The language of Section 706, which specifically provides for the use of measures that promote competition in local markets, reflects its adherence to the Act's procompetitive purpose. As the ALTS Petition argues, full implementation of Sections 251, 252 and 271 of the 1996 Act – not a waiver of these market-opening provisions – is the best way to achieve the mandate of Section 706.

CLECs like Hyperion and USN have invested enormous capital and expended great energy in establishing or planning the necessary infrastructure for various data applications. Such procompetitive investment is substantially diminished if CLECs like Commenters are relegated to fighting the BOCs over free and fair access to the local bottleneck. Ensuring reasonably-priced and nondiscriminatory CLEC access to the public switched network, rightfully theirs as contemplated by the 1996 Act's provisions, will encourage these efforts and enable Americans to gain better (and competitive) access to advanced telecommunications.

I. The ALTS Petition Will Allow the Commission to Underscore the 1996 Act's Overarching Purpose to Open Markets to Competition – Not to Preserve and Enlarge the Monopoly Advantages of BOCs

Enforcement of the 1996 Act as it stands should not be an issue of "we versus them," pitting CLECs against incumbents. If the BOCs were genuinely interested in advancing data services, they would seek to compete immediately – on equal terms with CLECs – to provide advanced services throughout most of the country (as they are currently authorized to do by law). As such, they should rally around the market-opening provisions of the 1996 Act – not seek to

stifle them. As numerous commenters previously stated in response to the BOC 706 Petitions,² waiving the carefully-crafted requirements of the 1996 Act would destroy incentives for BOCs to interconnect, unbundle, and collocate, and would allow BOCs to freeze competitors out of the telecommunications markets they already control.

Moreover, in making its decision under Section 706, the FCC should consider the procompetitive rules and regimes that state PUCs have painstakingly constructed and which apply with equal force to data and voice services. States have expended significant energy in fulfilling their joint duty to regulate interconnection, unbundling, and collocation under the 1996 Act. The FCC should take account of the sophisticated analyses and the resulting policies adopted by the State commissions.

II. BOCs Must Abide by the Law and Not Continue to Discriminate Against Competitors Through Control of the Infrastructure on Which All Providers Rightfully Rely

The FCC should establish and clarify rules of collocation to facilitate the competitive expansion of telecommunications services. By any measure, CLEC collocation of equipment has turned into an extraordinarily onerous and expensive task. As ALTS has illustrated, several BOCs have interpreted the 8th Circuit's decision in *Iowa Utilities Board*³ as allowing them to obstruct CLEC collocation with virtual impunity. The inability to collocate necessary data routing and other equipment impedes CLEC efforts to deploy high-speed access technology. To insure that collocation is available for one and all, the FCC must articulate a clear and consistent

² CC Docket Nos. 98-11, 98-26, 98-32.

³ 120 F.3d 753 (1998).

policy regarding the BOCs' obligation to provide collocation space in a timely, non-obstructive manner.

An affirmative order by the FCC declaring that Sections 251, 252, and 271 apply to BOCs' provision of digital and broadband services may be the only way to force BOCs to comply with their obligations under the 1996 Act. BOC refusals to unbundle network elements associated with ADSL and other data-related services, and to resell same, hinders competitive entry into the market for advanced telecommunications services. Consumers are also harmed when BOCs attempt to carve out data exceptions to interconnection agreements in force and refuse to negotiate terms and provision services related to data on parallel terms. Access to the local bottleneck is the crucial factor in CLECs' competitive ability to provide telecommunications services regardless of their categorization as voice or data.

III. If Anything, 706 Should Be Used to Force Open Markets So That Customers Will One Day Truly Be Able to Realize Competitive Choices

BOCs, who have full access to the networks they control, are presently investing in high-speed data services.⁴ Why shouldn't CLECs – which have forced BOCs to innovate in the first place by taking the initiative in building and funding infrastructure for advanced services – also have just and reasonable access to these networks? Even as BOCs, through invoking the regulatory process and imposing various obstacles, have attempted to run down CLEC resources, they contend that they alone have the wherewithal to provide such services to all Americans.

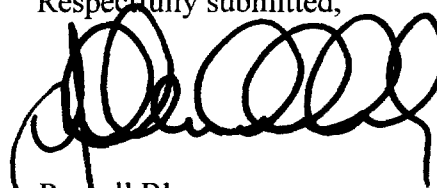
⁴ See, e.g., ALTS Petition at 8-9; *Bell Atlantic: High-Speed Data Network Planned*, KANSAS CITY STAR, June 6, 1998, at D3; *Bell Atlantic Is Making Plans to Build Advanced Long-Distance Data Network*, WALL ST. J., June 9, 1998, at B6; *Bell Atlantic Plans a Network for Data*, N.Y. TIMES, June 9, 1998, at C3; *Moneyline: New Network*, USA TODAY, June 1, 1998, at 1B.

Opening local markets to true competition through enforcement of the procompetitive provisions of the 1996 Act would let the market and consumers decide who is the best provider of services.

CONCLUSION

BOCs have responded to CLEC initiatives in bringing advanced services to the public by themselves investing and innovating in order to compete. These results of competitive pressure exerted by CLECs exemplifies the success of open competition as envisioned by the 1996 Act. To promote the increased availability of advanced services to all Americans, the Commission must affirm and ensure the CLECs' abilities to continue acting as the impetus behind competitive expansion of the telecommunications industry. For these reasons, Commenters support the ALTS petition and urges the Commission to make the requested declaratory rulings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Russell Blau', written over the typed name.

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Dated: June 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 1998, I caused the foregoing Joint Comments of Hyperion Telecommunications, Inc. and USN Communications, Inc. in Support of the ALTS Petition for a Declaratory Ruling in CC Docket No. 98-78, to be hand delivered to the following:

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A handwritten signature in black ink, reading "Karen M. Biscoe". The signature is written in a cursive style with a horizontal line underneath the name.

Karen M. Biscoe